No. 04-11545

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WYATT HENDERSON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. *Henderson*, No. 04-11545

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant To Eleventh Circuit Rule 26-1, in addition to the persons and entities listed in appellant's certificate, the United States of America hereby certifies that the following additional persons have or may have an interest in the outcome of the instant appeal:

R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

Jennifer Levin, Attorney, Appellate Section, Civil Rights Division, U.S. Department of Justice

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_____

Jennifer Levin

STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose oral argument.

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STATEMENT OF JURISDICTION

This is an appeal from a final, amended judgment of conviction in a criminal case. The district court, which had jurisdiction under 18 U.S.C. 3231, entered judgment on March 5, 2004 (Doc.106/RE14), and an amended judgment on March 12, 2004 (Doc.109/RE16).[1] Defendant Wyatt Henderson filed a timely Notice of Appeal

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[1] "R.__, p.__" or Doc.__, p.__" refer to the document number recorded on the district court docket sheet and page number, respectively. "RE __" or "RE _, p.__" refers to the tab number or tab and page number for documents contained in the Record Excerpts. When available, a cross-reference to the same material is

(continued...)

on March 8, 2004 (Doc.107/RE15), and an Amended Notice of Appeal on March 12, 2004 (Doc.110/RE17). This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in limiting testimony on an additional, alleged ground for a witness's bias when Henderson had sufficient opportunity to put the bias issue before the jury.
2. Whether the district court abused its discretion in permitting redirect examination to clarify a statement made in cross-examination.
3. Whether the district court abused its discretion pursuant to Federal Rule of Evidence 401 in permitting testimony on the sheriff's removal from office.
4. Whether the district court abused its discretion in denying admission of inconclusive polygraph test results for Henderson pursuant to Federal Rules of Evidence 702 and 403.
5. A) Whether Henderson waived any objection to the exclusion of testimony by a police expert.

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[1](...continued)
separated by a front slash ("/"). "Br. __" refers to the page of Henderson's opening brief.

B) If Henderson did not waive an objection, whether the district court abused its discretion in denying the admission of expert testimony on police procedures, pursuant to Federal Rule of Evidence 702, when such testimony was not helpful to the jury or consistent with the parties' evidence.

6. Whether the district court abused its discretion in admitting, pursuant to Federal Rule of Evidence 701, lay opinion testimony by the victim's treating physician regarding the way in which the victim was injured.

7. Whether the district court erred in approving a jury venire, pursuant to 28 U.S.C. 1863(b)(6), that excluded federal, state, and local law enforcement officers.

8. Whether Henderson's sentence, which is based, in part, on judicial findings is constitutional in light of *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004).

9. Whether this Court has jurisdiction to review a district court's discretionary denial of a downward departure.

STATEMENT OF THE CASE

1. Procedural History

Following a jury trial in December 2003, defendant Wyatt Henderson was convicted on three counts: using excessive force under color of law in violation of 18 U.S.C. 242 (Count One); obstructing justice by submitting a misleading and

incomplete report to his supervisor with the intent to hinder, delay, or prevent the communication to a law enforcement officer information relating to the commission of a federal offense, *i.e.*, his use of excessive force as alleged in Count One, in violation of 18 U.S.C. 1512(b)(3) (Count Two); and providing a false statement of a material fact to an agent of the Federal Bureau of Investigation in violation of 18 U.S.C. 1001 (Count Three).

On March 1, 2004, the district court sentenced Henderson to concurrent terms of 87 months' imprisonment for each of Counts One and Two, and 60 months' imprisonment for Count Three to run concurrently (Doc.105/RE13). On June 28, 2004, the district court indefinitely suspended Henderson's detention and he remains free on bond pending appeal (Doc.135).

2. Christopher Grant's Arrest

In May 2002, Sergeant Jerry White had overall supervision of the Charlotte County, Florida Sheriff's Department's Vice and Organized Crime Component (VOCC) (Doc.127, p.213-214). Defendant Corporal Wyatt Henderson was in charge of the day-to-day operations of the VOCC in May 2002, including an arrest operation on May 21, 2002 (Doc.127, p.108-109; Doc.130, p.560). On May 21, 2002, Henderson and several VOCC detectives including Keith Bennett, Jack Collins, Salvatore Durant, and Shane Desguin set up an undercover drug purchase at the Port

Charlotte Beach Complex as a ruse to arrest Christopher Grant (Doc.127, p.108-109; Doc.129, p.350-351, 367-368). They intended to arrest Grant, then 17 years old, for two prior sales of marijuana to Desguin (Doc.127, p.109; Doc.129, p.350-351, 366).

Henderson and several other officers were dressed in street clothes and were driving unmarked vehicles (Doc.129, p.296). After Grant arrived at the Beach Complex and parked his minivan, officers in two cars attempted to block Grant's minivan in its parking space in order to arrest him (Doc.127, p.112-113; Doc.129, p.296). Grant, however, was able to speed away from the officers through the parking lot out to the main road (Doc.127, p.113; Doc.129, p.296-297; 368, 387- 388). Henderson, who observed this activity from another spot in the Beach Complex parking area, immediately gave chase.

Grant sensed that these individuals were the police (although he did not see any of the visor blue and red lights that were activated in the unmarked cars) (Doc.127, p.114). Recognizing that his effort to escape was fruitless, Grant pulled over to stop on the shoulder of the road less than a mile from the Beach Complex (Doc.127, p.115; Doc.129, p.369, 393-394).

Henderson immediately pulled up along side and almost directly parallel to Grant's van (Doc.129, p.299, 321, 326; Doc.130, p.690). With his passenger-side window down, Henderson, with arm outstretched, pointed his Department-issued

weapon, a nine-millimeter SIG Sauer, at Grant (Doc.129, p.369; Doc.130, p.569). Grant testified that the officer instructed him to get out of the car, get on his knees, and show his hands (Doc.129, p.369, 371). According to Grant, he complied; he got out of the car, dropped down to his knees, and put his hands on his head (Doc.129, p.369, 371).

Continuing to point his weapon at Grant, Henderson moved around his car and was facing Grant (Doc.127, p.115; Doc.129, p.369-370). When Detective Bennett arrived at the scene, he saw Henderson "level" his gun at Grant while Grant, still standing, held his hands with palms facing out and spoke to Henderson (Doc.127, p.115). Bennett got out of the car and heard Henderson order Grant to the ground, but, according to Bennett, Grant did not comply immediately (Doc.127, p.115).

Bennett approached the two men, intending to help secure Grant in a prone position. He saw Henderson approach Grant "with his handgun still in his right hand" (Doc.127, p.116-117). Bennett then saw Henderson place one knee in Grant's back and "r[i]de" him to the ground (Doc.127, p.117; Doc.129, p.371). Grant felt the officer on top of him, forcing him to the ground (Doc.129, p.371). Henderson was approximately 6'5" and weighed 250 pounds, while Grant weighed approximately 160 pounds (Doc.130, p.666). As a result of Henderson's force and body weight, Grant hit his chin on the pavement and screamed (Doc.127, p.118; Doc.129, p.371).

Grant then saw a "black object" coming towards his head and then he was struck in the jaw (Doc.129, p.372). He did not see a gun until it was about six inches away from his face (Doc.129, p.406). At the time he was struck, Grant was already down on the ground and not resisting Henderson in any way (Doc.127, p.123; Doc.129, p.372). The strike to his face with the gun was "forceful" and felt like a "mack truck" (Doc.129, p.404-405). While behind Henderson, Bennett saw Henderson's arm move to strike Grant with his gun in his hand (Doc.127, p.117, 123, 172-173). Grant screamed after he was struck by Henderson (Doc.127, p.118, 171-172). Grant also blacked out briefly after this strike and when he regained consciousness, he was in handcuffs (Doc.129, p.372, 404).

Detective Durant had arrived on the scene with Bennett but he reached Henderson and Grant's location after Bennett (Doc.129, p.298). He arrived when Grant was already prone on the ground and he moved in to place handcuffs on Grant (Doc.129, p.298-299).

At the time Grant was handcuffed and brought upright, there were approximately five officers on the scene, including Bennett, Durant, and Henderson (Doc.129, p.407-408). Grant asked several officers at the scene why he had been hit (Doc.127, p.124; Doc.129, p.300, 353, 373). Only Detective Collins responded. When he asked Grant who struck him, Grant responded, "the big guy" (Doc.127,

p.180). Henderson was the largest officer on the scene (Doc.127, p.181).

Bennett recalled that, at the scene, Henderson made a comment about teaching Grant or guys like him a lesson (Doc.127, p.126). Bennett told Henderson that his conduct could lead to legal action and Henderson responded with indifference (*Ibid.*). When Sergeant Jerry White arrived at the arrest scene, Henderson told him that he (Henderson) had to take Grant "down hard," or words to that effect (Doc.127, p.220). Henderson did not inform White that he had struck Grant with a pistol in his hand (Doc.127, p.221).

Because of his injuries, Grant was taken to the Bon Secours St. Joseph's Hospital (Doc.129, p.374-375; Doc.130, p.516-517). He received five stitches for the cut underneath his chin (Doc.129, p.376, 403).[2] Three days after his arrest, Grant went to see Dr. Patricia Scott, an oral surgeon (Doc.129, p.376). At that time, the left side of Grant's face was swollen and bruised with "a yellowish blackish

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[2] By letter agreement, the parties confirm that Henderson's initial take-down, pushing Grant to the pavement and the resulting laceration to his chin, are *not* the basis for Count One (Doc.26/RE3).

mark" (Doc.129, p.377). Dr. Scott concluded that Grant had suffered a jaw fracture (Doc.131, p.733).

3. Henderson's Oral And Written Statements After Grant's Arrest

Soon after the arrest, when Lt. Sbarbori notified Henderson that all of the officers at the scene were required to write reports, Henderson became enraged and threw the telephone across the room and against the wall (Doc.127, p.129; see Doc.127, p.185). Detectives Collins and Bennett testified that Henderson responded, "Jesus Christ, you can't pistol-whip anybody any more," or words to that effect (Doc.127, p.129-130, 185-186). Henderson also stated that he needed to wipe DNA off of his gun (Doc.127, p.130, 187).

Henderson instructed VOCC detectives to not include details in their reports of the arrest (Doc.127, p.133, 186). For example, Henderson told Detective Bennett that Grant alleged that he (Bennett) struck Grant, and that his statement should describe only his own actions, and deny striking Grant (Doc.127, p.132). As a result, Bennett's report did not include his observation of Henderson striking Grant (Doc.127, p.140-141). Collins also did not report Grant's comment that he was struck by a gun (Doc.127, 186-187). The detectives left details out of their initial reports because they knew Henderson, as their supervisor, would be reviewing their statements (Doc.127, p.127, 135-136, 187). The detectives feared retaliation for being

forthright with allegations that their supervisor used excessive force (Doc.127, p.127, 135-136; see Doc.129, p.305, 309). When Bennett prepared a supplemental report that referred to Grant's repeated queries about being hit with a gun, Henderson reviewed the report at Bennett's desk, called him by a derogatory term, and commented that he essentially included too much information (Doc.127, 134-135, 187). Detective Durant prepared a report that included Grant's comments and questions about being pistol-whipped, and he gave his report directly to White, Henderson's supervisor, so Henderson would not see it (Doc.129, p.304).

Henderson submitted a level of resistance report to White addressing his use of force against Grant (Doc.127, p.228-229, 231). On the form, Henderson marked the box to record "no force, suspect handcuffed" (Doc.127, p.232, 264). Although this form has a narrative section, Henderson did not report that he struck Grant with a gun in his hand. White testified that had Henderson done so, White would have initiated an investigation (Doc.127, 233, 267).

On October 4, 2002, Edward Geiger, an agent with the Federal Bureau of Investigation, interviewed Henderson (Doc.129, p.331, 342). During the interview, Henderson described his arrest of Grant. At no time did Henderson admit that he struck Grant with a gun in his hand (Doc.129, p.342). Henderson stated that he was the first officer to pursue Grant after he left the Beach Complex, and that he pointed

his service weapon at Grant while driving alongside in order to force Grant to stop (Doc.129, p.336). Henderson stated that, while keeping his weapon pointed at Grant, he ordered Grant to get on the ground, but Grant did not fully comply (Doc.129, p.337-338). Henderson then moved around his car and approached Grant, who was on all fours (Doc.129, p.338). Henderson told Agent Geiger that he then threw his weapon into his car, and placed his knee in Grant's back to force Grant to the ground in a prone position (*Ibid*.). According to Henderson, Detective Durant arrived at that time and placed handcuffs on Grant (Doc.129, p.338). According to Geiger, Henderson's comment about throwing his gun into his car was "material" to his investigation of allegations of excessive force (Doc.129, p339).

STANDARDS OF REVIEW

This Court reviews evidentiary rulings for an abuse of discretion. *Tampa Bay Shipbuilding & Repair Co.* v. *Cedar Shipping Co.*, 320 F.3d 1213, 1216 (11th Cir. 2003) (evidentiary ruling is not reversed on appeal "absent a clear abuse of discretion"). This includes rulings under Federal Rules of Evidence 403 and 702, *United States* v. *Gilliard*, 133 F.3d 809, 812, 815 (11th Cir. 1998), Rule 401, *United States* v. *Todd*, 108 F.3d 1329 (11th Cir. 1997), and rulings that limit the scope of cross-examination, *United States* v. *Sheffield*, 992 F.2d 1164, 1167 (11th Cir. 1993). Rulings that bar evidence are reviewed for an abuse of discretion when the nature of

such evidence is known or a proffer is made; otherwise, these claims are reviewed for plain error. *United States* v. *Quinn*, 123 F.3d 1415, 1420 (11th Cir. 1997), cert. denied, 523 U.S. 1012, 118 S. Ct. 1203 (1998). If this Court determines that the district court abused its discretion, it then considers whether the error was harmless; *i.e.*, whether there is a reasonable likelihood that the error affected the defendant's substantial rights. *Id*. at 1420.

Constitutional challenges to jury selection are reviewed *de novo*. *United States* v. *Grisham*, 63 F.3d 1074 (11th Cir. 1995), cert. denied, 516 U.S. 1084, 116 S. Ct. 798 (1996).

Constitutional challenges to sentencing that are raised for the first time on appeal are reviewed for plain error. See *Johnson* v. *United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997). Timely challenges regarding an interpretation of the Federal Sentencing Guidelines are reviewed *de novo*, while findings of fact and applications of the Guidelines to those facts are reviewed for clear error. *United States* v. *White*, 335 F.3d 1314, 1317 (11th Cir. 2003).

SUMMARY OF ARGUMENT

The majority of Henderson's claims concern evidentiary rulings that are subject to the district court's discretion, and Henderson has failed to prove that the district court abused its discretion in any of its rulings. Evidence regarding additional

reasons for Detective Collins' transfer from the Vice Unit was irrelevant, and properly barred from admission. Even if relevant, Henderson had sufficient opportunity to present evidence of Collins' bias against Henderson, and Henderson was not prejudiced by this decision.

Collins' testimony on redirect, which addressed Grant's claim of assault and Henderson's post-assault comments, was appropriate to clarify a statement made in cross-examination. Even if considered improper vouching, any error was harmless.

Reference to the former sheriff's removal from office was relevant to addressing the workplace atmosphere and it did not prejudice Henderson.

The treating physician's testimony on the way the victim's injury occurred was permissible lay opinion testimony under Federal Rule of Evidence 701 since a witness may testify based on personal observation and specialized knowledge.

The district court appropriately barred evidence by exercising its gatekeeping function under Federal Rule of Evidence 702. First, the district court correctly barred inconclusive polygraph results given significant concerns with both the tests' reliability and its helpfulness to the jury, and a determination that such evidence would confuse the jury more than provide probative assistance. The district court also appropriately barred Henderson's proposed police expert since there was no issue of whether Henderson's actions were consistent with prevailing police standards.

Henderson's counsel also waived any claim to admission of his police expert.

The district court's jury plan that exempts law enforcement officers from jury service is reasonable and benefits the community since it ensures continuous service, and this exemption does not violate Henderson's Sixth Amendment right to a jury pool comprised of a fair representation of the community.

On plain error review, Henderson's challenge to his sentence under *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), should be rejected. Moreover, this court has no jurisdiction to review the district court's denial of a downward departure.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN RULINGS REGARDING TESTIMONY BY AND ABOUT JACK COLLINS

Henderson challenges two district court rulings regarding testimony by and about Detective Jack Collins: 1) barring testimony regarding additional, alleged bases for Detective Collins' transfer out of the Vice Unit; and 2) permitting redirect testimony by Collins regarding Grant's statement that he was struck. These challenges should be rejected because the district court's rulings complied with the

Federal Rules of Evidence, were well within the court's discretion, and did not violate Henderson's substantial rights.

A. Testimony By And Regarding Detective Jack Collins

Detective Collins testified that Grant made a comment at the arrest scene and one at the hospital about being struck, one of which implicated Henderson by describing his assailant as a "big guy" (Doc.127, p.180, 201). On direct, cross, and redirect testimony, Collins stated that he initially believed Grant's jaw injury was caused by Henderson's take-down, *i.e.*, Grant being pushed to the ground by Henderson (Doc.127, p.185), and not by Henderson striking him. But after hearing Henderson's comments the day after Grant's arrest, Collins changed his opinion and believed Grant's assertion of being struck (Doc.127, p.209-210; see p.9, *infra*).

Collins was cross-examined about his involuntary transfer out of the Vice Unit (VOCC) a few weeks after the assault on Grant and his friendship with Goff and Casarella, former VOCC supervisors (Doc.127, p.206). Collins denied that he was transferred because he improperly shared information about VOCC operations with these former supervisors. Counsel asked no additional questions on this subject (*Ibid*.).

Sergeant White testified that Collins was transferred out of VOCC, in part, due to his sharing information about VOCC operations with Goff and Casarella (Doc.127,

p.246). When defense counsel asked White whether there was another reason for Collins' transfer, the district court sustained the government's objection based on lack of relevance (*Ibid*.). Defense counsel did not make any proffer regarding the subject matter or relevance of the testimony he tried to elicit. Counsel only confirmed, through additional questioning, that Collins' transfer was involuntary and based on his conduct (*Ibid*.).

Henderson testified that he counseled Collins about his inappropriate sharing of information with Goff and Casarella and that that activity was one basis for Collins' transfer out of VOCC (Doc.130, p.637). Over the government's objection, Henderson was permitted to testify that Collins had other problems for which he was counseled (*Ibid*.). Given Henderson's supervisory role at VOCC, the evidence suggests (and Henderson concedes) that he had a role in Collins' warning and transfer (See Doc.130, p.637-639; Br. 8-9).

B. Discretionary Limits On Testimony Regarding Collins' Transfer Were Appropriate

Henderson acknowledges (Br. 8) that he was able to introduce evidence about Collins' bias, which he asserts resulted from Henderson's role in transferring Collins for sharing information with Goff and Casarella. Nevertheless, Henderson argues (Br. 8-9) that he should have been able to elicit evidence of an additional reason for Collins' bias. Henderson contends that Collins also was dismissed because of his

involvement in a domestic dispute. Henderson argues (Br. 9) that the district court inappropriately barred this testimony, and he should have been permitted to question White about the domestic dispute to establish Collins' bias.

Given Henderson's failure to proffer the specific nature of the evidence that was excluded, this Court should review his challenge for plain error. See *United States* v. *Quinn*, 123 F.3d 1415, 1420 (11th Cir. 1997), cert. denied, 523 U.S. 1012, 118 S. Ct. 1203 (1998); Federal Rule of Evidence 103(a)(2). The only information before the district court was that there were other alleged reasons for Collins' transfer. See Doc.127, p.246. There is no indication, however, that the district court knew this specific allegation since Henderson did not identify the evidence until a post-trial pleading (Doc.86, p.7) and his opening brief (Br. 9).

Henderson cannot show that the district court's ruling was "plain," "clear under current law," or "obvious" to satisfy plain error. See *United States* v. *Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993). The question before this Court is not whether testimony regarding the additional reason for Collins' transfer may have been relevant to bias, but whether Henderson had sufficient opportunity to present evidence regarding Collins' alleged bias. The answer is yes. Cf. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986) (court may impose limitations on cross-examination, particularly with respect to testimony that may cause "prejudice, * * * or interrogation that is

repetitive or only marginally relevant"; error occurs when all opportunities to explore bias are foreclosed).

Unlike circumstances where a party is barred from asking *any* questions that would address the source of a witness's bias, as occurred in *Van Arsdall*, here, defense counsel elicited from Henderson and White that Henderson had a role in Collins' transfer, which occurred less than two weeks after the assault on Grant (Doc.127, p.206; Doc.130, p.637-638). Henderson asserts that Collins is biased against him because of his (Henderson's) role in Collins' transfer out of VOCC. The jury was fully aware of Collins' transfer out of VOCC, one reason for his transfer (inappropriate sharing of information), and Henderson's role in this action and, thus, Henderson was able to address Collins' alleged bias against him. This alleged, additional reason for Collins' transfer, apart from the transfer itself, was not relevant, and would not aid in Henderson's defense. See *United States* v. *Tokars*, 95 F.3d 1520, 1541 (11th Cir. 1996) (no abuse of discretion in limiting cross-examination when sufficient evidence of witness' bias against the defendant was established through other questioning), cert. denied, 520 U.S. 1151, 117 S. Ct. 1328 (1997).[3]

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[3] Henderson's citation (Br. 9) to *United States* v. *Noriega*, 117 F.3d 1206, 1217(11th Cir. 1997), is inapposite. In *Noriega*, *ibid*., the sole basis to address the (continued...)

Even if deemed relevant and considered under the abuse of discretion standard, this evidence would have been appropriately barred under Federal Rule of Evidence 403 given that the prejudicial nature of evidence of a domestic dispute outweighed its probative value. Cf. *United States* v. *Hands*, 184 F.3d 1322 (11th Cir.), corrected by 194 F.3d 1186 (11th Cir. 1999) (prejudicial impact of evidence of domestic abuse outweighed probative value; erroneous admission was not harmless). In any event, the failure to admit this evidence did not affect Henderson's substantial rights. The cumulative nature of this testimony would have little, if any, impact on the jury's verdict since Henderson's role in Collins' transfer already was known to the jury. See *Quinn*, 123 F.3d at 1420-1421 (harmless error when testimony wrongfully excluded is cumulative).

C. Collins' Comment On Grant's Claim Of Being Struck

Henderson argues (Br. 16-18) that Collins' testimony that he considered Grant's allegation of being struck to be credible (after he heard Henderson's inculpatory statements) was prejudicial, and invaded the jury's province of determining witness credibility. First, the district court did not abuse its discretion in permitting this

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[3](...continued)
extent of a witness's bias in favor of the defendant was by addressing an incident, unrelated to the charged offense, during which the witness protected the defendant from serious physical harm. This case does not mean that any event unrelated to the charged offense is automatically relevant to proving bias.

questioning on redirect examination to clarify a statement made during cross-examination. See *United States* v. *Rodriguez-Cardenas*, 866 F.2d 390, 394-395 (11th Cir. 1989), cert. denied, 493 U.S. 1069, 110 S. Ct. 1110 (1990). Moreover, even if Collins' response to the United States' query constituted vouching, which the United States does not concede, such testimony, given its brevity, was harmless.

On direct examination, Collins testified about Henderson's description of the take-down, his initial impression that Grant's injury was due to Henderson's take-down, and Henderson's multiple, incriminating comments in the days after the arrest, including "you can't pistol-whip anyone anymore" (Doc.127, p.185-187).

On cross-examination, Collins testified that he considered Henderson's explanation that Grant was injured as part of the take-down to be credible at the time he prepared his report of the incident (Doc.127, p.198). Collins also testified that he later reached an opinion about Grant's injury based on Henderson's comments (*Id*. at 199). Collins agreed that officers sometimes say things amongst themselves that would not be said before the general public, and some comments are in jest (*Id*. at 200).

On redirect, Collins explained that "just about every time" an arrestee is brought into custody, the arrestee will claim that he has been harmed by an officer (Doc.127, p.209/RE12, p.209). Redirect examination then proceeded as follows:

U.S.: But then, sir, did there come a time when you found his [Grant's] claim to be credible?
Defense: Objection.
Court: Overruled.
Collins: Yes.
U.S.: When was that?
Collins: The days after the incident.
U.S.: And why was that?
Collins: The comments that were made.
Defense: Objection.
Court: Overruled.
U.S.: I'm sorry.
Collins: The comments that were made.
U.S.: The comments made by who?
Collins: Corporal Henderson.

(*Ibid*.). Collins also reiterated Henderson's comments about not being able to pistol-whip someone, and about supervisors being out to get him (*Id*. at 210). Collins stated that no arrestee besides Grant had complained about being hit with a gun. He also stated that he would not joke about striking someone since "that's not a joking matter" (*Id*. at 210).

Since it was not clear why Henderson objected to this testimony, this Court should review the objection for plain error. See Fed. R. Evid. 103(a)(1), (d). Even if considered for abuse of discretion, however, permitting this redirect is squarely within the court's discretion. See *Rodriguez-Cardenas*, 866 F.2d at 394-395. A

party may conduct redirect "to rebut false impressions that arise from cross examination." *Id*. at 394.

By emphasizing on cross-examination the different nature of communication among officers as compared to contact with the public, Henderson tried to create the impression that his comments about pistol-whipping were made in jest and, therefore, were an improper basis for Collins to believe that Henderson struck Grant. Given this focus, the district court acted within its discretion by appropriately admitting redirect examination of Collins that distinguished Grant's allegations of being struck with a gun from other arrestee's general allegations of harm based on Henderson's behavior and testimony. Cf. *Rodriguez-Cardenas*, 866 F.2d at 394-395; see *United States* v. *Martinez*, 775 F.2d 31, 37 (2d Cir. 1985) (testimony not admissible on direct examination may be permitted on redirect given the impressions left on cross-examination; cited approvingly in *Rodriguez- Cardenas*, 866 F.2d at 394-395).

Moreover, Henderson mischaracterizes (Br. 17) the importance of Grant's testimony by claiming the United States' case "depended" on Grant as its "main witness." Of course, the victim's testimony was important, but Grant was not the only important witness for the government. Detective Bennett testified Henderson had a gun in his hand when he took Grant to the ground, and he saw Henderson make a

swinging gesture to hit Grant in the face (Doc.127, p.117, 172-173). In addition, Detectives Bennett and Collins testified to Henderson's incriminating comments after the incident. Significantly, Henderson also testified, and the jury rejected Henderson's version of the events in reaching its verdict.

The importance of Collins' testimony was not that he was vouching for Grant's credibility. Instead, it was that Collins heard Henderson's statements, he did not believe them to be in jest, and he understood them to admit that Henderson had, in fact, hit Grant with his gun. Henderson's cited caselaw is, again, inapposite as it addresses opinion testimony that encompasses conclusions of law, *Kostelecky* v. *NL Acme Tool, Inc.*, 837 F.2d 828, 830 (8th Cir. 1988), or expert opinions that are based on assessments of witness credibility, *United States* v. *Scop*, 846 F.2d 135, 142 (2d Cir. 1988).

Even if this Court considers Collins' comment impermissible vouching on behalf of a witness, this single statement was brief and did not infringe on Henderson's substantial rights. Cf. *United States* v. *Cano*, 289 F.3d 1354, 1365- 1366 (11th Cir. 2002) (prosecutor's examination and comments in closing on witness's obligation to testify truthfully pursuant to plea agreements are not vouching for credibility; even if so, comments are harmless), cert. denied, 124 S. Ct. 493 (2003). In addition, there is no reason to believe that this exchange influenced the jury's

verdict; it was a brief comment in the course of trial and it was not highlighted or mentioned during closing. Moreover, the jurors were instructed that it was their role to determine witness credibility (Doc.131, p.846, 847). Cf. *United States* v. *Myers*, 972 F.2d 1566 (11th Cir. 1992) (improper opinion testimony harmless given instruction to jurors to assess the facts and witness credibility), cert. denied, 507 U.S. 1017, 113 S. Ct. 1813 (1993).

II

THE SHERIFF'S REMOVAL FROM OFFICE FOR FRAUD WAS RELEVANT

Henderson argues (Br. 10) that evidence that Sheriff Clements was removed from office for committing fraud should not have been admitted because it was irrelevant and was introduced solely to prejudice Henderson through guilt by association. This testimony was both relevant and not prejudicial to Henderson.

Major Raymond Komar, one of two majors who reported directly to the sheriff, was responsible for administrative matters (Doc.129, p.441-442). On cross-examination, the United States asked Major Komar whether Sheriff Clements had "a number of problems" near the time of Henderson's assault on Grant (Doc.129, p.438/RE12, p.438). Henderson objected based on relevance, which was overruled, and Komar responded, "I guess so. I don't know." (*Ibid*.). When asked by government counsel whether Clements had been removed for fraud, defense

counsel objected without stating the basis, and again was overruled (*Id*. at 438-439). Komar responded, "a couple months ago."[4] (*Id*. at 439).

Information regarding Clements' removal was relevant to describe the workplace atmosphere and ethos at the Sheriff's Department. Testimony from the detectives reflected a view that those who reported misconduct would be retaliated against, while those who were in supervisory positions and friendly with the sheriff would get away with wrongdoing. For example, Detective Bennett testified that he was initially reluctant to include all of the information he knew or heard regarding Henderson's assault on Grant because of fears of retaliation for reporting such misconduct. Detective Collins similarly left information out of his report on Henderson's instructions, and Detective Durant submitted his report to someone higher than Henderson in order to avoid Henderson's review. See p.9-10, *infra*. A short time after the arrest, Henderson reported that management determined he was cleared of any wrongdoing (Doc.127, p.136). Shortly after Bennett reported allegations to the FBI, he was transferred to an undesirable position and then fired for failing to include allegations about Henderson striking Grant in his initial report (Doc.127, p.139-140; Doc.129, p.429, 489-490; Doc.130, p.641). Henderson, in

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[4] The United States notes that Daniel Platt, Director of Intelligence at the Sheriff's Department, also stated, over a general objection, that Sheriff Clements was removed for fraud (Doc.130, p.538).

contrast, was never disciplined by the Sheriff's Department for assaulting Grant and he was permitted to resign (Doc.129, p.438). When management heard an informal allegation that Henderson pistol-whipped Grant, Glenn Sapp, Director of Training, referred the matter for an administrative inquiry and he included his own assessment that the allegation against Henderson was false (Doc.129, p.472-475). This initial inquiry only considered whether policies and procedures were violated; it was not an investigation of the allegations (Doc.129, p.478).

Given the evidence presented regarding the office environment, and management's treatment of allegations of misconduct, the sheriff's own misconduct and removal from office is relevant to depict his perspective on the lawful performance of duties. There is no indication or reasonable basis to assert that the jury's conviction of Henderson for excessive force and false statements was unduly tainted or influenced by the brief mention of Sheriff Clements' removal from office for an unrelated act of fraud. Henderson was hired by Sheriff Clements, yet this connection or friendship with the sheriff (Doc.129, p.443, 481), does not show that Henderson similarly engaged in fraud. Instead, this evidence supports the inference that Henderson enjoyed a level of protection from adverse consequences despite his misconduct, as shown by the lack of any disciplinary action against Henderson, yet the termination of Detective Bennett.

Henderson's reliance on *United States* v. *Marshall*, 173 F.3d 1312, 1317-1318 (11th Cir. 1999), and *United States* v. *Mankami*, 738 F.2d 538, 546 (2d Cir. 1984), to assert that evidence of the Sheriff's removal prejudiced Henderson is misplaced since both cases address the potential for prejudice to one co-conspirator based on evidence regarding other co-conspirators. In *Marshall*, 173 F.3d at 1317-1318, this Court found two evidentiary errors reversible because, *inter alia*, one piece of challenged evidence, based on a prior arrest, did not satisfy Federal Rule of Evidence 404(b). This Court noted in *dicta* that the prior arrest of two defendants was "potentially prejudicial" to the third defendant because of his association with the other two defendants. *Id*. at 1317 n.11. In *Mankami*, 738 F.2d at 546, the Second Circuit stated the government presented insufficient evidence to support defendant's participation in a conspiracy, and that the evidence effectively sought to establish guilt by the defendant's presence and association with the others.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN BARRING POLYGRAPH TESTIMONY

Henderson asserts (Br. 18-21) that the district court erred in its exclusion of two polygraph test results for Henderson. The district court, after a hearing and thorough consideration of the evidence, appropriately ruled that this evidence was inadmissible under Federal Rule of Evidence 702, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*,

509 U.S. 579, 592, 113 S. Ct. 2786, 2796 (1993), and Federal Rule of Evidence 403 (Doc.44/RE5).

Before trial, Henderson filed a motion in limine seeking the admission of polygraph evidence (Doc.24) and the United States objected (Doc.25). Magistrate Judge Sheri Polster Chappell held a *Daubert* hearing on September 22, 2003 (Doc.43). Henderson presented four polygraphers who were qualified as experts (Doc.44, p.1-5/RE5, p.1-5). George B. Slattery, a polygrapher for over 30 years, discussed polygraph procedures generally (Doc.44, p.2-3/RE5, p.2-3). Sanford H. Guttmann had administered a polygraph examination to Henderson on December 18, 2002, which produced inconclusive results on truthfulness in the first analysis, and truthful responses in the second analysis (Doc.44, p.3-4/RE5, p.3-4). Peter Beller reviewed and concurred with Mr. Guttmann's assessments (*Id*. at 4-5). FBI polygrapher Thad Loudenback also administered a polygraph examination to Henderson that produced inconclusive results on deception for the first series of questions, and no deception in responding to a second series of questions (*Id*. at 5). A second FBI polygrapher reviewed and concurred with Loudenback's assessments (*Ibid.*). The United States cross-examined these witnesses but did not submit independent evidence.

The Magistrate Judge issued a Report and Recommendation concluding that the polygraph evidence did not meet the standards of *Daubert* and, therefore, the evidence was inadmissible under Federal Rule of Evidence 702 (Doc.44, p.7- 10/RE5, p.7-10) Moreover, the Magistrate found the evidence inadmissable under Federal Rule of Evidence 403 given the potential for juror confusion and prejudice that would outweigh any probative value (*Id*. at 10-11). Henderson objected to the Report and Recommendation (Doc.53/RE6). The district court, on *de novo* review, adopted the Report and Recommendation (Doc.57, p.1/RE8, p.1).

In *United States* v. *Piccinonna*, 885 F.2d 1529, 1535-1536 (1989), this Court, en banc, eliminated the circuit's per se ban on polygraph evidence and ruled that such evidence is admissible upon stipulation by the parties, or for impeachment or corroboration if 1) the using party gives sufficient notice of its intent to offer such testimony; 2) the opposing party has an opportunity for a similar polygraph; and 3) the evidence comports with the Federal Rules of Evidence; *i.e.*, Rules 608, 702 and 403. Even if these criteria are met, this Court made clear that it remains within the district court's discretion to admit or deny polygraph evidence. *Piccinonna*, 885 F.2d at 1536; see *United States* v. *Gilliard*, 133 F.3d 809, 812 (11th Cir. 1998) (citing *Piccinonna).*

In *Daubert*, 509 U.S. at 589-591, 113 S. Ct. at 2794-2796, the Supreme Court held that scientific evidence is admissible under Federal Rule of Evidence 702 if it constitutes "scientific knowledge" and the evidence is helpful and would assist the trier of fact to determine a fact in issue. The Court also set forth several criteria to assess whether evidence qualifies as scientific knowledge, including whether it is sufficiently reliable and accurate, and whether it is subject to peer review and acceptance in the community. *Ibid*.

Henderson argues (Br. 20-21) that sufficient evidence was presented to meet *Daubert*'s criteria on peer review, test accuracy, and conformity to standards. The Magistrate, however, applying *Daubert*'s criteria, made detailed findings that rejected the reliability and accuracy of polygraph tests generally, as well as the utility of presenting to the jury the experts' specific findings with respect to Henderson (Doc.44, p.7-11/RE5, p.7-11). First, the Magistrate found that there was insufficient evidence of a scientifically demonstrated connection between responses deemed deceptive and a subject's lying (*Id*. at 7-8). Second, while acknowledging that the peer review standard was met, the Magistrate noted the continuing debate on the reliability of polygraph examinations (*Id*. at 8). The Magistrate further concluded that the potential for error or false readings remains high; there is no objective means of measuring accuracy and maintaining standards; and the scientific and legal

community's acceptance of polygraph test data remains a subject of intense debate (*Id*. at 9-11).

In addition, the Magistrate concluded that the polygraph evidence did not satisfy Federal Rule of Evidence 702's second criterion of being helpful to the jury, and similarly was inadmissible under Rule 403 because the inconclusive results would confuse the jury as to its essential role: to determine whether Henderson, with a pistol in his hand, struck Grant (Doc.44, p.11-13/RE5, p.11-13).

Henderson tries to refute (Br. 20) this conclusion by reference to the lack of evidence of polygraph results' undue influence on juries generally. See *Piccinonna*, 885 F.2d at 1536. The Supreme Court, however, more recently opined that polygraph evidence regarding a defendant's alleged guilt or innocence "may diminish the jury's role in making credibility determinations," and have undue influence on the jury's central role. *United States* v. *Scheffer*, 523 U.S. 303, 315- 316, 118 S. Ct. 1261, 1267 (1998).

Moreover, Henderson ignores the district court's discretion to admit or deny polygraph evidence even if *Piccinonna*'s criteria are met (which the United States does not concede given, *inter alia*, the lack of reliability or uniformity in test implementation). See *Gilliard*, 133 F.3d at 812; *Piccinonna*, 885 F.2d at 1536; Doc.43, p.150-154. Merely satisfying the standards does not require or entitle a

defendant to the admissibility of polygraph evidence. *Piccinonna*, 885 F.2d at 1536. Moreover, the inconclusive results from Henderson's two polygraph examinations reinforce the questionable value of this evidence and the potential for jury confusion. Thus, Henderson has failed to show that the district court abused its discretion in ruling that the polygraph evidence here was not sufficiently reliable for admission under Rule 702, and more prejudicial than probative under Rule 403. Cf. *Gilliard*, 133 F.3d at 812-816 (affirms district court's finding that polygraph evidence is inadmissible under Rules 702 and 403).

IV

THE DISTRICT COURT APPROPRIATELY BARRED HENDERSON'S PROPOSED EXPERT WITNESS ON POLICE PROCEDURE

Henderson claims (Br. 10-13) that he was unduly restricted in presenting his defense because the district court barred testimony from his police expert regarding the appropriateness of Henderson's alleged placement of his gun in his car before his take-down of Grant. Henderson waived any right to object since trial counsel made the tactical determination that she would not call any expert, and had no need to call an expert if the United States did not call an expert on police procedure, which it did not. Even if this claim is not waived, the district court appropriately barred such testimony since the expert's proposed testimony would not help the

jury understand the evidence or determine a fact in issue, as required by Federal Rule of Evidence 702.

Before trial, the United States filed a motion in limine to prohibit or restrict testimony from Henderson's proposed police expert, Ken Katsaris (Doc.60/RE10). Henderson filed a response and a cross-motion to limit testimony by the government's proposed police expert (Doc.62/RE11). The district court granted both motions. During trial, the United States notified Henderson's counsel of its intention, at that time, not to call its expert on police procedures (Doc.127, p.193). Later in the trial, Henderson's counsel again raised the issue (Doc.127, p.289-291). During this exchange, Henderson's counsel twice stated that she only saw the utility of defendant's expert *for rebuttal*, and if the United States called its expert:

> MS. ROWE [Henderson's counsel]: I just had a question on this police expert. It's my understanding that you're provisionally granting both motions in limine, I'm taking that, I'm interpreting that to mean that if they call their police expert and I need mine to rebut it, we'll revisit it . . . *So if they don't call their police expert in their case in chief, and they don't intend to at this juncture, then basically my expert serves no purpose.*
>
> THE COURT: You have to make that judgment call, but it would appear that way to me.
>
> * * *
>
> MS. ROWE: [S]o therefore he would be needed only to talk about why an officer should put a gun in the car as opposed to take it into a ground fight so to speak. And it's my understanding based on my motion

> in limine that they can't say it's not believable that he would do it, and my guy[] [is] limited to rebuttal. So if they can't say it's not believable to do it, then my officer saying why it makes all the sense in the world is- am I understanding your ruling correctly? *I'm just trying to decide if there's anything left for him to testify to.*
>
> THE COURT: So what you're saying, he has nothing to testify to because he has nothing to rebut.
>
> MS. ROWE: That's the way I'm taking your ruling.
>
> THE COURT: That's the way I meant the ruling to be taken.
>
> MS. ROWE: Then I'm taking it correctly. We may not have a problem on Tuesday.
>
> MR. MOLLOY [Assistant U.S. Attorney]: As I understand it, we can argue that Mr. Henderson, if he takes the stand and testifies to what he did, that that testimony is not credible.
>
> THE COURT: Just like any other statement he makes.
>
> MS. ROWE: *They would not be calling their expert, and we would eliminate ours*. There would be no police experts.

(Doc.127, p.289-291) (emphasis added).

Henderson's counsel raised this issue again, stating counsel's intent *not* to call its expert if the United States did not call its expert.

> MS. ROWE: If your ruling is still the way it was, then the issue that might been opened is the [sic] how inappropriate it was for him to toss the gun in the car. It pretty much boils down to that. And because they did ask-
>
> THE COURT: Well, but it was a matter of his practice rather than general police practice, so they don't have an expert to say that - I don't think

> his [Henderson's] testimony opened the door for them to bring in an expert to say that, no reasonable law enforcement officer would have done that.

(Doc.130, p.711-712). Significantly, the district court also stated that it did not believe the evidence supported an expert on general police procedure since, *inter alia*, the United States was not asserting that Henderson's actions violated a standard police procedure, but that Henderson's version was not credible (Doc.130, p.713-714). Henderson's counsel acknowledged this ruling and did not specifically object; she only reiterated concern that the United States not call its expert on its rebuttal (Doc.130, p.714-715).

In his brief (Br. 12), Henderson ignores trial counsel's affirmative decisions, as set forth in the excerpts above, not to call its expert because the United States did not present expert testimony. Henderson made a tactical decision regarding a witness, and failed to preserve an objection to the court's ruling on admissibility. This Court should not review a claim that is waived and is no more than an effort to rectify Henderson's defense strategy. See *New York* v. *Hill*, 528 U.S. 110, 114-115, 120 S. Ct. 659 (2000) (evidentiary decisions are waivable issues); *United States* v. *Olano*, 507 U.S. 725, 733-734, 113 U.S. 1770, 1777-1778 (1993) (waiver, which is the intentional relinquishment of a known right, is not reviewable).

Even if considered on the merits, this expert testimony is inadmissible because it does not satisfy Federal Rule of Evidence 702. Rule 702 allows expert testimony when, *inter alia*, it is helpful to the trier of fact to understand the evidence or determine a fact in issue. See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591, 113 S. Ct. 2786, 2795-2796 (1993). The district court appropriately determined, exercising its "gatekeeping" function, that Henderson's proffered evidence did not meet this standard (Doc.130, p.711-713). See *Quiet Tech. DC-8, Inc.* v. *Hurel-Dubois UK Ltd.*, 326 F.3d 1333,1341 (11th Cir. 2003) (assessments of the reliability and relevance (*i.e.*, helpful to the jury) are independent under Rule 702); *United States* v. *Majors*, 196 F.3d 1206, 1215 (11th Cir. 1999), cert. denied, 529 U.S. 1137, 120 S. Ct. 2022 (2000).

Henderson testified on direct and cross-examination that he threw his gun in his car before his take-down of Grant (Doc.130, p.650-652). During cross-examination, the United States challenged the truthfulness of his testimony (Doc.130, p.650-652, 654, 660-661). The issue before the jury was whether Henderson's version of events was credible, not whether his action was consistent with general police procedure.[5]

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[5] The United States asked Henderson whether his alleged placement of his gun in his car before the take-down violated the department's policies and procedures. Henderson responded in the negative (Doc.130, p.663). As the district

(continued...)

The cases cited by Henderson – *United States* v. *Mohr*, 318 F.3d 613 (4th Cir. 2003); *United States* v. *Myers*, 972 F.2d 1566 (11th Cir. 1992), cert. denied, 507 U.S. 1017, 113 S. Ct. 1813 (1993); and *Samples* v. *City of Atlanta*, 916 F.2d 1548, 1551 (11th Cir. 1990) – are inapposite. In each of those cases, there was no issue of *whether* the officer used force, but, rather, whether the use of force was reasonable in light of prevailing law enforcement standards. *Mohr*, 318 F.3d at 617; *Myers*, 972 F.2d at 1577; and *Samples*, 916 F.2d at 1551. Similarly, Henderson's reliance on *Boykins* v. *Wainright*, 737 F.2d 1539, 1544 (11th Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1775 (1985), is inapposite. In *Boykins*, *id*. at 1544-1545, this Court reversed the trial court because it had excluded evidence that was "crucial, critical, [and a] highly significant factor [for] * * * defense." Here, in contrast, the jury needed to determine what actually occurred, *i.e.*, did Henderson use his gun in his hand to strike Grant, or did he throw it in the car and never strike Henderson.

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[5](...continued)
court noted, there was no evidence in the record that Henderson's alleged actions violated Department procedures, and this single inquiry did not place compliance with general procedures at issue (Doc.130, p.713). Henderson's assertion (Br.13) that the United States argued that Henderson's alleged placement of the gun in his car was "against police practices" is erroneous, is totally without support in the record, and he does not attempt to support it with citations to the record.

The issue of whether such action was consistent with departmental or prevailing police standards would not have been helpful to the jury's assessment of the facts.

V

GRANT'S TREATING PHYSICIAN'S OPINION ON THE CAUSATION OF GRANT'S INJURY IS PERMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 701

Henderson claims (Br. 13-16) that Dr. Patricia Scott's opinion on the cause of Grant's jaw injury was expert testimony and, therefore, violated Federal Rule of Evidence 701. This claim is without merit because, as this Court recognized, Rule 701 permits such testimony when it is based on personal observation and specialized knowledge.

Since the United States failed to provide the requisite notice of its intent to call Dr. Scott as an expert witness pursuant to Federal Rule of Criminal Procedure 16, the district court ruled that Dr. Scott could not testify as an expert (Doc.131, p.728). The court, however, permitted her to testify as a lay witness, and added, "fact witnesses that are doctors are a little different. They can give opinions in the course of their treatment [about] what they did and why they did it. We'll have to take the questions as they come" (*Ibid*.).

Dr. Scott saw Grant three days after Henderson's arrest (Doc.131, p.731). Dr. Scott stated that the left side of Grant's face was swollen and, as confirmed by x-ray,

Grant had a mandible (jaw) fracture (*Id*. at 732-733). Based on information provided by Grant, her experience (including 4 years in residency and 12 years in practice as an oral surgeon), and her examination of Grant, Dr. Scott opined that this fracture occurred when Grant's mouth was open and he was struck on the left side of his face (*Id*. at 729, 736-737).

Federal Rule of Evidence 701 permits lay opinion testimony when it is 1) based on personal observation; 2) helpful to an understanding of the evidence or a fact in issue; and, after the 2000 amendment, 3) "not based on scientific, technical, or other specialized knowledge *within the scope of Rule 702*" (emphasis added). In *Tampa Bay Shipbuilding & Repair Co.* v. *Cedar Shipping Co.*, 320 F.3d 1213, 1231-1223 (11th Cir. 2003), this Court held that Rule 701, both before and after the 2000 amendment that added the Rule's third criterion,[6] permitted lay opinion testimony that is based on first hand observations and "particularized knowledge garnered from years of experience within" a specialized field, including lay opinions by business owners on reasonable costs of repairs. This Court reviewed its pre-Amendment precedent that approved lay opinion testimony on issues that exceeded a common person's understanding and was based on observation and specialized experience. See, *e.g.*, *United States* v. *Novaton*, 271 F.3d 968, 1009 (11th Cir. 2001) (lay opinion testimony

[6] The 2000 amendment was in effect at the time of Henderson's trial.

on meaning of code words in defendants' conversations within scope of Rule 701), cert. denied, 535 U.S. 1120, 122 S. Ct. 2345 (2002); *United States* v. *Myers*, 972 F.2d 1566, 1577 (11th Cir. 1992) (admitted officers' lay opinions that burn marks were consistent with those caused by a stun gun, and officer's actions were not consistent with standards of reasonable force), cert. denied, 507 U.S. 1017, 113 S. Ct. 1813 (1993).

This Court concluded that the advisory committee on Rule 701 did not intend, by adding the 2000 amendment, to eliminate such lay opinions based on specialized knowledge. See *Tampa Bay*, 320 F.3d at 1222-1223. The rule's advisory committee added the specific reference to Rule 702 (specialized knowledge, etc. "not * * * within the scope of Rule 702") to respond to concerns that, without this phrase, *all* opinions based on technical or specialized knowledge would be barred by Rule 701. *Tampa Bay*, 320 F.3d at 1222-1223. Accordingly, opinions based on certain specialized knowledge remain admissible under both amended Rule 701 and Rule 702. See *ibid*. Henderson's claim (Br. 15) that because Dr. Scott's testimony was based on specialized knowledge, she had to be qualified

as an expert, ignores the plain language of Rule 701 and this Court's earlier rejection of the same argument. *Id*. at 1232.

VI

THE EXCLUSION OF LAW ENFORCEMENT OFFICERS FROM THE GRAND AND PETIT JURY DOES NOT VIOLATE THE SIXTH AMENDMENT

Henderson argues (Br. 21) that the district court's exclusion of law enforcement personnel from grand and petit juries violated his Sixth Amendment right to a jury drawn from a fair, cross-section of the community. This Court previously rejected that argument in *United States* v. *Terry*, 60 F.3d 1541, 1544 (11th Cir. 1995), cert. denied, 516 U.S. 1060, 116 S. Ct. 737 (1996).

Pursuant to the Jury Selection and Service Act, 28 U.S.C. 1861 *et seq*., the United States District Court of the Middle District of Florida adopted a plan for the qualification and random selection of jurors. See Doc.58, p.3/RE9, p.3. Consistent with the Act's exemptions, 28 U.S.C. 1863(b)(6), the district court exempted from participation "members of the fire and police department of any state, district, territory, possession, or subdivision thereof," as well as "public officers in the executive * * * branches of the Government of the United States." See Doc.58, p.3-4/RE9, p.3-4. In practice, the juror questionnaire excluded a "member of any governmental police * * * department." See *id*. at 4.

To establish a *prima facie* Sixth Amendment claim, a defendant must show that 1) a distinctive group is excluded; 2) this group's representation in venires is not

fair and reasonable in relation to their numbers in the community; and 3) this underrepresentation is due to systematic exclusion. *Duren* v. *Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668 (1979). If a *prima facie* case is established, a jurisdiction may defend disproportionate representation by showing the exemption serves a "significant state interest." *Id*., 439 U.S. at 368, 99 S. Ct. at 670. A state may grant "reasonable exemptions" to, *inter alia*, occupational groups since they are "unlikely" to "pose substantial threats that the remaining pool of jurors would not be representative of the community." *Id*., 439 U.S. at 370, 99 S. Ct. at 671 (citing *Taylor* v. *Louisiana*, 419 U.S. 522, 534-536, 95 S. Ct. 692, 700 (1975)).

Significantly, in *Terry*, 60 F.3d at 1544, this Court rejected a claim, like Henderson's, that 28 U.S.C. 1863(b)(6)'s exclusion of police officers violated the defendant's Sixth Amendment right to a jury comprised of a fair cross-section of the community. This Court held that an exemption from jury service for an occupational group such as the police does not violate the Constitution because an exemption that ensures their work for the community is uninterrupted is both "good for the community" and "reasonable." *Ibid*.; see *id*. at 1544 n.1 (*Taylor*'s holding is "not contrary" to *Terry* since, as this Court explained, "*Taylor* recognized the constitutionality of exempting occupational groups if to do so would benefit the community."); see *Taylor*, 419 U.S. at 534, 538. This Court is bound to follow *Terry*

and, therefore, Henderson's claim should be summarily rejected.[7] See *United States* v. *Hanna*, 153 F.3d 1286, 1298 (11th Cir. 1998) (only en banc opinion, an "overriding" Supreme Court opinion, or statutory change can override a prior panel's decision).[8]

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[7] Henderson's attempts to distinguish *Terry* are without merit. The fact that his claim concerns Florida rather than Georgia police officers raises a distinction without a difference. Second, even if the district's practice is slightly more expansive than the exemptions set forth in the jury plan and the Act, it "does not substantially contravene" the Act to warrant relief (Doc.58 at p.12/RE9, p.12); see *United States* v. *Tuttle*, 729 F.2d 1325, 1328 (11th Cir. 1984), cert. denied, 469 U.S. 1192, 105 S. Ct. 968 (1985) (not all technical violations warrant judicial relief; defendant must show "substantial failure to comply" with the Act).

Moreover, law enforcement officers are not a "distinctive group" and, therefore, Henderson cannot satisfy the first element of the *prima facie* case. See *Willis* v. *Kemp*, 838 F.2d 1510, 1514-1518 (11th Cir. 1988), cert. denied, 489 U.S. 1059, 109 S. Ct. 1328 (1989). A distinctive group is one that, *inter alia*, has shared interests or views that are distinct from, and not adequately represented by, others in the community. *Id*. at 1516 (rejecting claim that young adults,18-29 year olds, constituted a distinct group for Sixth Amendment jury selection). Nothing suggests that the views of police officers are so internally cohesive, or so different from other members of the community such that their exclusion eliminates a specific viewpoint of potential jurors. The district court noted this potential flaw but did not resolve this issue (Doc.58, p.8 n.9/RE9, p.8 n.9).

[8] Henderson asserts (Br. 23-24), that even if no one error warrants reversal, the cumulative effect of multiple errors deprived him of a fair trial. Because, for the reasons set forth above, p. 14-43, *infra*, Henderson has failed to show how the district court abused its discretion in any evidentiary ruling, there can be no cumulative error. See *United States* v. *Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004).

Even if this Court found that the district court abused its discretion and that errors were harmless individually, no combination of these alleged errors deprived Henderson of a fair trial. At bottom, the jury assessed the credibility of all of the witnesses, including Henderson, and determined that Henderson was not telling the

(continued...)

VII

THE SUPREME COURT'S *BLAKELY* DECISION DOES NOT INVALIDATE HENDERSON'S SENTENCE

Henderson asserts (Br. 24-26) for the first time on appeal that, under *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), his sentence is unlawful because it is based on judge-determined rather than jury-determined facts.[9] Henderson also asserts (Br. 27-30) that the district court erred in not granting a downward departure for conduct outside the heartland of the Guidelines or for aberrant behavior.

Because Henderson did not challenge the constitutionality of his sentence before the district court, his *Blakely* claim is subject to plain error review. See *Johnson* v. *United States*, 520 U.S. 461, 117 S Ct. 1544 (1997); *United States* v. *Duncan*, No. 03-15315, 2004 WL 1838020, at *3 (11th Cir. Aug. 15, 2004) (citing *United States* v. *Curtis*, No. 02-16224, 2004 WL 1774785, *2 n.2 (11th Cir. Aug. 10, 2004)).[10] In *Duncan*, 2004 WL 1838020, at *3, this Court held that a defendant

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[8](...continued)
truth. A defendant is not entitled to a perfect trial, only a fair trial, and Henderson cannot establish he had otherwise. See *United States* v. *Adams*, 74 F.3d 1093, 1099 (11th Cir. 1996) (even though errors, substantial rights were not affected, and substantial evidence establishes guilt).

[9] Henderson also argues that either this Court should reduce his sentence to a criminal offense level based on jury-determined facts or it should remand for resentencing under the district court's discretionary authority (Br. 24-27).

[10] This Court's ruling on plain error analysis in *Curtis* was an alternative

(continued...)

challenging a sentence under *Blakely* cannot satisfy the second prong of plain error analysis: that the error is "obvious" or "clear under current law." See *United States* v. *Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993). That conclusion was based primarily on two factors: 1) that *Blakely* itself states that the Supreme Court was not addressing the constitutionality of the Federal Sentencing Guidelines, see *Blakely*, 124 S. Ct. at 2538 n.9, and 2) that "there is considerable disagreement among jurists and among the circuits" on whether *Blakely* applies to the Federal Sentencing Guidelines. *Duncan*, 2004 WL 1838020, at *3.

More recently, this Court reviewed a challenge under *Blakely* that was timely filed in the district court. *United States* v. *Reese*, No. 03-13117, 2004 WL 1946076, *1 (11th Cir. Sept. 2, 2004). This Court held that *Blakely* does not apply to the Federal Sentencing Guidelines, and the Guidelines remain a valid "tool for channeling the sentencing court's discretion within a crime's maximum and minimum sentence provided in the United States Code, with that maximum being

the only constitutionally relevant maximum sentence." *Id*. at *4. Because this Court

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[10](...continued)
holding. The Court's initial holding was that the defendant's request for supplemental briefing on *Blakely*, raised for the first time after argument, was untimely. *Curtis*, 2004 WL 1774785, at *1. An alternative holding, just as a single holding, is equally binding on subsequent panels. See *Aron* v. *United States*, 291 F.3d 708, 713 n.4 (11th Cir. 2002).

is bound by its prior panel decisions, Henderson's claim that his sentence violates *Blakely* must be rejected. See *United States* v. *Hanna*, 153 F.3d 1286, 1298 (11th Cir. 1998) (only en banc opinion, an "overriding" Supreme Court opinion, or statutory change can override a prior panel's decision).[11]

Moreover, this Court repeatedly has held that it has no jurisdiction to review a district court's denial of a downward departure unless such denial is based on the district court's mistaken belief that it does not have the authority to depart. *United States* v. *Ortega*, 358 F.3d 1278, 1279 (11th Cir. 2003) (per curiam); *United States* v. *Brenson*, 104 F.3d 1267, 1286 (11th Cir. 1997) (citing *United States* v. *Patterson*, 15 F.3d 169, 171 (11th Cir. 1994)). At sentencing, the district court ruled that Henderson failed to prove that his case warranted a downward departure on any of the asserted grounds; that it was outside the heartland, that Grant provoked Henderson, or that Henderson's behavior was aberrant (Doc.111, p.23, 28, 31, 33- 34). See *Koon* v. *United States*, 518 U.S. 81, 94, 116 S. Ct. 2035, 2045 (1996).

There is no indication that the district court believed it lacked authority to depart

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[11] The United States notes that this issue will be resolved by the Supreme Court, which has granted the government's petition for certiorari review of a decision of the Seventh Circuit, see *United States* v. *Booker*, No. 03-4225, 2004 WL 1535858 (7th Cir. July 9, 2004) (2-1 decision), cert. granted, No. 04-104 (Aug. 2, 2004), and for review prior to judgment of a case pending in the First Circuit, see *United States* v. *Fanfan*, No. 04-1496 (1st Cir. 2004), cert. granted, No. 04-105 (Aug. 2, 2004).

downwards and, therefore, this Court lacks jurisdiction to review the district court's discretionary decision. *Ortega*, 358 F.3d at 1279.

CONCLUSION

This Court should affirm Henderson's conviction and sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2004, two copies of the foregoing Brief For The United States As Appellee were served by Federal Express, overnight mail, on the following counsel of record:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that the foregoing Brief For the United States As Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 10,770 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

September 16, 2004

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